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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 372

CHERRYWOOD APARTMENTS, INC., OAKWOOD APARTMENTS, INC., APPLEWOOD APARTMENTS, INC., ET AL.,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CARL L. SHIPLEY,
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Statutes Cited

Lanham Act (54 Stat. 1125, as amended (42 U.S.C. 1521, *et seq.*):	
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No. 372

CHERRYWOOD APARTMENTS, INC., OAKWOOD APARTMENTS, INC., APPLEWOOD APARTMENTS, INC., WOODSIDE BUILDING CORPORATION, WOODLAND PARK, INC., *Petitioners,*

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Carl L. Shipley, on behalf of petitioners listed above, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled case on July 9, 1951.

Opinions Below

The opinion of the Court of Claims (R. 7-10) is not yet reported.

Jurisdiction

The judgment of the Court of Claims was entered on July 9, 1951 (R. 10). The jurisdiction of this Court is invoked under 28 U. S. C. 1255(1).

Questions Presented

The questions presented are:

1. Whether the court below erred in construing the Lanham Act, (54 Stat. 1125) as amended, as imposing no limitation upon the Government's authority to operate temporary war housing constructed pursuant thereto, except the Administrator's absolute discretion, and

2. Whether the court below erred in concluding that the Lanham Act, the President's housing proclamation of Dec. 14, 1946, and the activities of the Federal Housing Authority in inducing plaintiffs to construct rental housing of a specified type, taken as a pattern of conduct, do not constitute an implied undertaking on the part of the Government not to engage in destructive competition with plaintiffs' private rental housing operations.

Statutory and Contract Provisions Involved

1. The Lanham Act, (54 Stat. 1125) as amended, (42 U. S. C. 1521 et seq.) provides that the Administrator is authorized to build and operate temporary war housing on certain specific conditions, towit, for persons engaged in national defense activities, in those localities in which the President has found that an acute shortage of housing exists or impends which would impede national defense activities and that such housing will not be provided by private capital when needed (Section 1) or, for distressed families of servicemen and for veterans and their families, who are affected by evictions or other unusual hardships, where their needs cannot be met through utilization of the existing housing supply, in localities where the Administrator has found that an acute shortage of housing exists or impends, and that, because of war restrictions, permanent housing cannot be provided in sufficient quantities

when needed (Section 501), and that the Administrator shall remove all temporary war housing as promptly as may be practicable and in the public interest (Section 313) (R. 2, 9).

2. In 1944 and 1945 the Government, pursuant to the Lanham Act, constructed, and since then has operated, temporary war housing at Front Royal, Virginia (R. 1, 6, 8, 9, 15).

3. On December 14, 1946, the President by proclamation (White House release #936) urged private builders to construct rental housing and promised the aid of executive agencies, Congress, and the Government in general in the construction, financing and operation of private rental housing (R. 2, 8).

4. In 1947 and 1948 plaintiffs, in response to the President's promises of December, 1946, and in reliance on the limitations on Government operation of temporary war housing contained in the Lanham Act, and after approval and inducement by the Federal Housing Authority, constructed, and have since operated private rental housing units at Front Royal, Virginia (R. 1, 8).

5. Despite the fact that the President, as required by the Lanham Act, has made no finding since 1944 that there is an "acute housing shortage" in Front Royal, Virginia, which will impede national defense and which will not be met by private capital, and despite the fact that there has been no substantial defense activity in Front Royal since 1945, the Government has continued to operate said temporary war housing providing rental housing for more than 10% of the total population of the city, renting to tenants who are neither defense workers, distressed families of servicemen, nor veterans and their families who are affected by evictions or other unusual hardships, in clear violation of the plain language of the Lanham Act, while a surfeit of private rental housing, built in response

to the Government's inducements and promises of aid and assistance, stands idle and empty (R. 3, 5).

Statement

This action was instituted by a petition filed in the Court of Claims by plaintiffs to recover damages arising out of violation by the Government of the Lanham Act, and breach by the Government of an implied undertaking not to engage in unfair and destructive competition with private rental housing built in response to the President's promises of December 14, 1946, and in reliance on the Federal Housing Authority's determination that such private housing was needed, and the general pattern of conduct of the Government which clearly implied aid and not destructive and unfair competition.

Defendant demurred to plaintiffs' petition.

The Court of Claims held that while the Government's activities were illogical, they did not spell out a promise to close down the Government's temporary war housing as soon as private housing caught up with the demand, and that the removal of temporary war housing from the rental market depends on the Administrator's sole discretion, statutory provisions to the contrary notwithstanding.

Reasons for Granting the Writ

We submit that the holding of the Court of Claims not only ignores the express language of the Lanham Act, but also disregards its plain purpose. Moreover, it fails to take into account the realities of ordinary business practice which are embodied in the law of implied agreements, and, if the decision is allowed to stand, will utterly discourage the construction of private rental housing in any locality where Government temporary war housing is in operation, thus perpetuating a housing shortage, and re-

quiring the permanent operation by the Government of emergency housing. Also, if allowed to stand, the decision sets up an insoluble dichotomy, *i.e.*, either the Administrator can at his discretion rent temporary war housing to anyone under any circumstances, regardless of the existence of available private housing or the fact that his tenants do not fall within the statutory classes of war workers, servicemen, or distressed veterans, which is judicial authorization for violation of the Lanham Act, or, the Lanham Act authorizes the Government to engage in the business of rental housing regardless of any connection with a federal constitutional purpose, which construction of the Lanham Act makes it unconstitutional on its face. Congress has no power to put the Government in the rental housing business as an end in itself, but only if that be a legitimate and appropriate means to a constitutional end, which here is housing persons directly connected with the war effort.

In view of the manifest importance of this decision and the substantial doubts as to its correctness, we submit that this case is appropriate for review here.

1. *The Lanham Act—Express Language*

The Lanham Act in Sec. 1 and Sec. 501 sets forth in explicit and exclusive detail the classes of persons for whom the Government is authorized to provide temporary war housing, towit, "persons engaged in national defense activities, and their families," or "distressed families of servicemen and veterans and their families who are affected by evictions or other unusual hardships", and no others. The Act also provides in explicit and exclusive detail the conditions under which the Government may provide these specified classes of persons with temporary war housing, towit, for the first class, "* * * in those areas or

localities in which * * * an acute shortage of housing exists * * * which would impede national defense activities and * * * would not be provided by private capital * * *", and for the second class, "* * * in those areas * * * where * * * an acute shortage of housing exists and * * * because of war restrictions permanent housing cannot be provided * * * (Where their needs cannot be met through utilization of the existing housing supply) * * *". Absent these classes of persons or these specific conditions, the Government has no statutory authority to operate temporary war housing.

2. *The Lanham Act—Purpose*

The plan and purpose of the Lanham Act of 1941 is clear. From beginning to end it is instinct with the intent of Congress under the war powers of the Constitution to vest in the Executive the authority, for emergency purposes only, to build and operate temporary war housing for war workers and service personnel in those extraordinary situations where private enterprise, because of material shortages, and governmental restrictions, could not supply the housing when needed.

3. *Implied Undertaking of the Government*

Agreements implied in fact arise out of the actions of the parties undertaken with the intent of evoking responsive action from each other. In this case the Government engaged in a pattern of conduct which was intentionally designed to encourage private enterprise to build rental housing by promising aid and assistance. No business man in his right mind would have supposed the Government with one hand would beckon him into business with promises of aid and support, and then with the other drive him into bankruptcy with an intentional course of destructive and unfair competition. Yet, fantastic as it seems, the

court below not only condones this conduct of the Government, but legitimizes it by finding statutory authority therefore in the Lanham Act.

Conclusion

For the above reasons, it is respectfully submitted that this petition should be granted.

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October 7, 1951.

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In the Supreme Court of the United States

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v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7-10) is reported in 98 F. Supp. 577.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1951 (R. 10). The petition for a writ of certiorari was filed October 8, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a governmental obligation to cease operation of temporary war housing projects as soon as the supply of private housing should equal the housing demand may be implied from the Lanham Act of October 14, 1940, as amended, 42 U.S.C., secs. 1521, *et seq.*

STATUTE INVOLVED

Section 313 of the Lanham Act, as amended by the Act of April 20, 1950, sec. 202 64 Stat. 72, 42 U.S.C., Supp. IV, 1533, provides:

> SEC. 313. Except as otherwise provided in this Act, the Administrator shall, as promptly as may be practicable and in the public interest, remove (by demolition or otherwise) all housing under his jurisdiction which is of a temporary character, as determined by him, and constructed under the provisions of this Act, Public Law 781, Seventy-sixth Congress, and Public Laws 9, 73, 353, Seventy-seventh Congress. Such removal shall, in any event, be accomplished not later than December 31, 1952 or by such later date as may be required because of extensions of time in accordance with section 604 hereof, with the exception only of such housing as the Administrator, after consultation with local communities, finds is still urgently needed because of a particularly acute housing shortage in the area: *Provided*, That all such exceptions shall be reexamined annually by the Administrator and that all such exceptions and reexaminations shall be reported to the Congress. Not-

> withstanding any other provisions of law except provisions of law hereafter enacted expressly in limitation hereof, no Federal statute, or regulation thereunder, shall prohibit or restrict any action or proceeding to recover possession of any housing accommodations for the purpose of carrying out the provisions of this section or section 604 of this Act.

STATEMENT

Petitioners here seek review of a judgment of the Court of Claims dismissing the case upon demurrer (R. 10). The allegations of the petition (R. 1-4) filed February 28, 1951, may be briefly summarized as follows:

During 1944 and 1945, the Government, acting under the Lanham Act, caused temporary war housing projects to be constructed at Front Royal, Virginia. Petitioners are engaged in the construction, operation and sale of residential rental properties and between 1947 and 1949 they constructed specified dwelling units in connection with the emergency housing program announced by the President in 1946. It is alleged that since 1948 there has been no acute housing shortage in Front Royal and that since 1945 no substantial defense activities have been carried on in that area. Asserting that petitioners, operating private business enterprises, could not hope to compete with federal war housing, it is alleged that they undertook construction and operation of the dwelling units already mentioned "upon defendant's implied

undertaking" in the Lanham Act "not to compete with private housing" (R. 2-3). The Government has continued to operate its projects. Judgment is sought in specified sums representing property losses by way of expenses and losses of rents and profits.

The United States attacked the petition by demurrer and by a plea to the jurisdiction (R. 3-4). After argument, the Court of Claims sustained the demurrer holding that no promise could be spelled out of the Lanham Act that the Government's temporary war housing would be shut down as soon as privately financed housing caught up with demand.

ARGUMENT

1. Petitioners argue that continued operation of the housing projects is inconsistent with the purposes of the Lanham Act which were to promote the war effort by supplying housing for war workers and servicemen in areas where an acute shortage of housing existed or impended (42 U.S.C. 1521). There is no suggestion that these conditions did not exist when the Government's housing projects were constructed in 1944 and 1945 or that, in any other particular, the projects failed to meet the requirements of the Lanham Act.

2. Congress did not, as petitioners assume, require that all temporary war housing projects be liquidated just as soon as the conditions which

required their erection ceased to exist. On the contrary, recognizing that in the interest of orderly administration some time would be required to terminate the program, Congress, in 1943, added section 313 to the Lanham Act providing that temporary war housing should be removed "as promptly as may be practicable and in the public interest" with a terminal date (subject to exceptions to be reported to Congress) of two years after the President declares that the emergency declared by him on September 8, 1939, has ceased to exist. Act of July 7, 1943, sec. 4, 57 Stat. 388.[1] Subsequent statutes have changed the terminal date so that at the time of the hearing below it was December 31, 1952. See Act of June 28, 1948, Sec. 4, 62 Stat. 1064; Act of October 25, 1949, 63 Stat. 906; Act of April 20, 1950, sec. 202, 64 Stat. 72;[2] see also *id.*, sec. 201, 64 Stat. 59, 42 U.S.C., Supp. IV, 1585.

These express provisions relating to the liquidation of temporary war housing projects negative any possible implied undertaking to terminate such operations at an earlier date. As the court below concluded (R. 10), "the various expressions of Congress were what they purported to be, acts

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[1] This emergency has not been generally terminated. See *Woods* v. *Miller Co.*, 333 U.S. 138, 140, fn. 3.

[2] Further provisions relating to temporary housing, not material here, have been made by sections 603 and 604 of the Defense Housing and Community Facilities and Services Act of 1951, approved September 1, 1951, Public No. 139, 82d Cong., 1st Sess.

of legislation, and not statements implying promises that governmentally constructed housing would not be permitted to compete, even temporarily, with private housing to the prejudice of the latter." Since the decision below is plainly correct, there is no occasion to discuss here other objections to maintenance of this suit, such as the standing of petitioners to recover damages resulting simply from competition or the effect of the pendency of a suit in another court to compel housing officials to terminate operations of these projects (Pet. 4-6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER 1951.

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